***United States Court of Appeals***

***for the Second Circuit***

# PETITIONER'S BRIEF

# NO. 77-4153

## *UNITED STATES COURT of APPEALS*

### FOR THE SECOND CIRCUIT

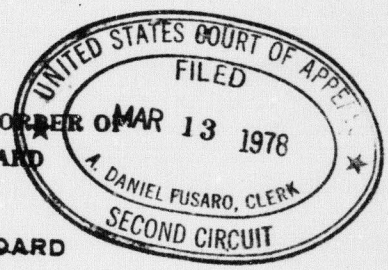
NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

PINTER BROS., INC.,

Respondent.




ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
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# BRIEF FOR
# THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by threatening employees with reprisals for assisting or supporting the Union, by promising benefits to employees for refusing to support the Union, and by anticipatorily refusing to bargain with the Union.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Barber and Pagliarulo, by laying off employees Healy and Gulbrandsen, and by constructively discharging employee Bonadonna and subsequently refusing to re-employ her—all because of these employees' support for the Union.

3. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1), (3) and (4) of the Act by subjecting employee Diane Lufker to closer supervision, by changing Lufker's working conditions so as to provide her with less employment and criticizing her for having testified before the Board.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151 et seq.), for enforcement of its order (D5-6,JD 51-52)[1/] issued against Pinter Bros., Inc. (hereafter "the Company"), on January 12, 1977. The Board's Decision and Order,by Members Fanning, Pennello and Walther (who dissented in part, finding a bargaining order not warranted here), are reported at 227 NLRB No. 123. This Court has jurisdiction over the proceedings, the unfair labor practices having occurred in Deer Park, New York.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the employees contact the Union.

The Company is a trucking enterprise which maintains a fleet of 200 trucks and employs approximately 170 employees at its Deer Park facility (JD3; Tr. 903-904). The Company's drivers, platform men and warehousemen

1/ By stipulation of the parties, a deferred appendix will be filed. "D" herein refers to the decision and order of the Board; "JD" refers to the decision of the Administrative Law Judge; "Tr." refers to the stenographic transcript of the hearing before the Administrative Law Judge; "GCX" refers to the General Counsel's and "RX" to the Company's exhibits respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

have been represented for over 20 years by the Union.[2] (JD3; Tr. 905.) The instant case involves the attempts of the Company's approximately 39 clerical employees to secure representation by the Union.

In October or November, 1974, employee Vera Barber began discussing with several other office employees common grievances and the possibility of organizing a union (JD4; Tr. 29). These discussions took place at lunch, during coffee breaks, at the homes of the employees and during working hours (JD4; Tr. 30). On December 27, 1974, the Company notified employees that, effective January 6, 1975, their hours were to be changed. The employees discussed the matter with considerable intensity at work. (JD4; Tr. 31.)

On January 10, 1975,[3] Joseph Pinter, Sr., the Company's majority stockholder and chairman of the board of directors, called a meeting of the office employees, at which he said that it had come to his attention that the employees "felt harassed by the change in hours." (JD4; Tr, 33-34). He explained that business was slowing down, that he had already asked the drivers to accept a four-day week, and that "as far as the office is concerned", he doubted that business would get that bad but that he hoped to go on a 4-day week rather than having to let the least

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2/ Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

3/ Unless otherwise indicated, all subsequent dates refer to 1975.

senior employees go (JD4; Tr. 35-36). On Friday, January 10, about 13 clerical employees went to lunch together and decided to draw up a list of grievances over the weekend to present to Robert Pinter, son of Joseph Pinter, Sr., and President of the Company. They decided that if the grievances were not resolved, they would contact the Union (JD4; Tr. 31-32, 36, 688). Upon their return from lunch, the employees conversed in the lobby of the Company's building. There they encountered Richard Jacoby, the Company's office manager, who told them that "the door is not locked" and they could enter. (JD4; Tr. 38, 287.) At approximately this time, Company supervisor Catherine Turk asked employee Charlotte Destefanis if she "had heard any of the girls talking about a Union . . . ." Although Destefanis had attended the employee meetings and subsequently signed a card, she "did not want to say anything" to Turk and answered that she knew nothing. (JD 14; Tr. 760).

On Tuesday, January 14, employee Beatrice Pagliarulo spoke to Ted Spera, the Union's shop steward for the Company's drivers, about Union representation (JD4; Tr. 189-190). On the following morning, Spera gave employee Vera Barber some Union authorization cards. Barber and Pagliarulo then spoke with about 17 other employees about meeting for lunch that day at a nearby restaurant (JD4-5; Tr. 39-41). At lunch, Barber and Pagliarulo told the other employees that if they signed the cards, the Union would then be representing them, and that there would be a meeting later on that night (JD5; Tr. 42).[4/] Barber, Pagliarulo and most of the other employees signed cards during lunch (JD5, 8; Tr. 42, 282, 450).

4/ That evening, Spera met with a number of the employees at a bowling alley and discussed the benefits the employees would receive from union representation (JD5; Tr. 48).

Later that afternoon, at about 5:00 p.m., President Robert Pinter called Vera Barber into his office and showed her a telephone company survey consisting of all local telephone numbers to which outgoing calls had been placed between November 12 and December 9 (JD8; Tr. 44, 921).[5/] In the presence of supervisors Richard Jacoby and Charles Brown, Pinter asked Barber if she had made the calls which he had marked on the survey as probably emanating from her, adding that she knew she was not supposed to make personal calls. Barber apologized and offered to pay for the calls. Pinter replied that this would not be good enough, and told her that he had also requested the telephone company to make a similar survey for September and October. He explained that after he had received those surveys, he would decide what to do about her (Tr. 951). Pinter told Barber that he had advised her supervisor, Charles Brown, that she no longer was to touch the telephone. (JD8-9; Tr. 44-45.)

After Barber had left his office, Pinter called in employee Beatrice Pagliarulo and a similar conversation ensued (JD9; Tr. 195). Pagliarulo also apologized and offered to pay for the calls. She told Pinter that she "didn't see any point in him going back in the survey, that he should warn you and look ahead to see if you stopped" (JD9; Tr. 197). After leaving Pinter's office, Pagliarulo was told by her supervisor, Catherine Turk, that she was being removed from her job as an "on hand" clerk--which involved using a telephone--and reassigned to a "floater" position because she could not be trusted with a telephone (JD9; Tr. 197-198).

5/ Robert Pinter had requested the telephone company to conduct a survey of the Company's local phone lines at the end of December, 1974--beginning of January 1975. The month, chosen at random, for the survey was November 1974. The survey, received by Pinter on January 15, shows the date, duration and telephone number called of all local calls placed between November 12 and December 9 (JD5; Tr. 920-921,1101).

Pagliarulo thereupon went back to Pinter's office to protest the job change, and attempted to explain the length of some of the calls shown on the survey (JD9; Tr. 198-199). Pinter then brought up the matter of the earlier change in hours, and Pagliarulo explained to him why the employees were upset about it. The conversation ended with Pinter refusing to rescind Pagliarulo's transfer (JD9; Tr. 200-201). Dolores Fletcher, a third employee shown on the telephone survey as having made personnel calls, was not confronted by the Pinters at that time (JD 9).

On the following day, January 16, Office Manager Jacoby had a meeting with all office personnel (JD9; Tr. 50, 204). He told them that the Company was in the process of obtaining the telephone surveys, that personal calls were getting out of hand, that two women had been warned about the matter on the preceding day and that the Company was going to start checking on personal calls (JD9; Tr. 204). A group of employees again went to lunch together on that day, and Jacoby and Robert Pinter watched them from a window of the office building as they left the parking lot (JD9; Tr. 52).

B. The Company discharges Union proponents Barber and Pagliarulo.

On Friday, January 17, after leaving work at about 5:30 p.m., employees Barber, Pagliarulo, Charlotte Destefanis and Joanne Berderane waited in the parking lot for night-shift employee Sinclair, with the purpose of ascertaining the amount of union support among the night-shift employees (JD 9; Tr. 53-54). Pagliarulo, Destefanis and Berderane were seated in Barber's car. Barber met night shift employee Alberta Nash and engaged her in conversation. (JD9; Tr. 55.) Pinter, Sr., left the building at this time, got into his car, which was parked about 20 feet left of Barber's car, drove up to Barber and Nash, asked them "How are my

lovely night girls," and told them to have a nice weekend (JD9; Tr. 56, 207,209). He started to pull away, but looked into his rear view mirror, saw the waiting employees and then made a U-turn, parked his car and re-entered the building (JD9; Tr. 56, 89-90, 693). The day shift employees met Sinclair entering the lot and shortly thereafter drove off (JD9; Tr. 57 210). When Sinclair entered the building, she saw Joseph Pinter, Sr. looking out of the office window. He asked Sinclair if anyone had approached her. Sinclair replied that the women had just said "hello" to her. (JD10; Tr. 527.)

A few minutes later, at about 6:30 p.m., Robert Pinter sent telegrams to Barber and Pagliarulo at their homes, notifying them that they had been terminated "for violation of company policies brought to your attention on 15 Jan 1975" (JD11; GCX 3, 6). Barber received a notice that Western Union had attempted to deliver the telegram, but did not actually see a copy for several days (JD11; Tr. 59). She spoke with Pagliarulo on Saturday, January 18, however, and learned that Pagliarulo had also received a telegram and was told about its contents (JD11; Tr. 96). The two women met with Whitey Schneir, a Union business agent, over the weekend (JD11; Tr. 213). They also called most of their fellow employees, notified them of their discharges, and arranged to meet at a diner early Monday morning (JD11; Tr. 214).

Sometime thereafter, employee Diane Lufker was passing through the Company's lunchroom. As she passed a table occupied by Office Manager Jacoby and Controller Charles Brown, she overheard Jacoby say to Brown, "I told the old man not to fire those two girls, but he said no, because he doesn't want the union in." (JD 14, 20; Tr. 627.)

C. The Company lays off employees Gulbrandsen and Healy.

On Monday, January 20, approximately 18 employees went to the early morning meeting, at which union representative Schneir advised them that he would meet with Pinter that morning. The employees then went to work, and Schneir went to the Pinters to request recognition for the Union (JD11; Tr. 214-215, 62-63, 1223). Employees Deborah Gulbrandsen and Jane Healy attended the January 20 morning meeting and reported to work at about 8:30 a.m. Gulbrandsen noticed that her time card was missing, and that Pinter, Sr. and Office Manager Jacoby were standing near the timecard rack (JD12; Tr. 319.) Pinter called Gulbrandsen over and said that "work was slow" and that she would not be needed any more; that she was being laid off (JD12; Tr. 320). At approximately the same time, Healy also was told by Pinter, Sr. that she was being laid off because business was slow (JD12; Tr. 358). The two employees then went out into the lobby of the building and joined Schneir and shop steward Spera (JD12; Tr. 320).[6/]

Barber and Pagliarulo also went to the Company's office shortly after the morning employee meeting. Pinter, Sr. and Office Manager Jacoby approached Barber and, in the presence of employee Destefanis, Pinter, Sr. asked Barber if she had received the telegram. When Barber replied that she had not, Pinter, Sr. told her she had been given "the pink slip", adding," We don't need you and more." When Barber then asked if that were all, Pinter, Sr. said, "that is all." (JD11; Tr. 61-62, 679.) Barber left the office and joined Schneir, Spera, Healy and Gulbrandsen in the hall; Pinter, Sr. followed and went up to Schneir and told him that "[t]hese girls have

6/ Two employees hired after Gulbrandsen remained on the job; Healy was senior to five other employees who were not laid off (JD12; Tr. 322-323, 328-329, 359-360).

been terminated and if you don't mind, I don't want you holding any meetings on my private property." Schneir thereupon left. (JD11; Tr. 62-63.) The Union filed a petition for an election later that day (JD13).

Pagliarulo also spoke to Pinter, Sr. shortly after arriving at work and asked him what the telegram was about. Pinter Sr. told her "business is slow, we no longer have any use for you." When Pagliarulo asked why the telegram stated that she had been fired for "violation of company policy," Pinter, Sr. said that he did not know, and that she should ask his son, Robert. Pagliarulo thereupon spoke to Robert Pinter. He told her she had been discharged because of her personal phone calls. (JD11; Tr. 217.) When she stated that she thought he was waiting for the September and October surveys, he replied that he "didn't have to wait for anything." Pagliarulo asked why Pinter, Sr. had just told her she was discharged because business was slow, whereupon Robert Pinter said that "regardless of the reason, you are fired, so get off the premises." (JD11; Tr. 215-217.)

D. The Company threatens the employees with reprisals.

1. The letters of February 19 and March 18 and 25.

On February 19, the Company sent a three-page letter, signed by Robert Pinter, to its employees (JD41-42; GCX 1(f), Appendix A). In the letter, the Company told the employees that the Union cannot promise benefits and they should not be "fooled into thinking that having a Union guarantees you a job." The letter also stated that the Company's wages, benefits and working conditions were as good as any in the area, that, despite the recession, the Company has "tried to keep everyone working" and that:

> You know from your own experience that we have not laid off office employees during slack periods. Pinter Bros. thinks it owes an obligation to employees to give them job security. No Union can do as well.

The letter went on to say that union orgainization frequently results in strikes and loss of wages, and that if the Union "wants an election and makes economic demands which the employer cannot meet, there is a strike or the employer finds ways to replace workers and reduce the work staff." The letter then discussed the Company's willingness to settle grievances, stating that:

> If there have been grievances which have not been settled, we will do our best to see that the reasons for grievances will be eliminated.

The February 19 letter also referred to the genesis of the union organizing, stating that "We think we know what started it", that "[i]n every company, there are one or two people who are disgruntled and who do not care whether [their] job is safe or not, and that it is reasonable to discharge employees who make excessive phone calls". In the midst of this discussion, the letter stated:

> You know very well that when costs begin to go up, a Company can only survive by cutting costs. In a trucking business, the cost of labor is the highest costs we have. There is a rule that says labor cost for a local trucking company exceed 60 cents of each $1.00 revenue. Once you get above the 60 cents, the company begins to lose money and jobs are lost.

Towards the end of the letter, the Company stated:

> There will be an election. You will be given all kinds of promises. A handful of empoyees will be trying to persuade you to vote for the Union. They won't tell you about the dues, assessments and strikes, and the loss of jobs.

> They won't tell you that a Union can't force an employer to pay more than the employer can afford to pay; otherwise the employer is driven out of business and jobs go down the drain.

The Company's two-page letter of March 18 (JD42; GCX 1(f), Appendix B) began by telling employees that, in the coming week, they "will have a chance to vote for your future with Pinter" and that the employees should "remember that your future, your job and your family's interests are involved in the election." After comparing the Union's probability of delivering on its promises to that of a New York politician, the letter discussed the two discharged employees who "began to stir up trouble because they had no interest in your job. They don't care about your family or your future." The letter then referred to the employees' pension plan as the "best . . . of any trucking company" and stated:

> If the Union comes in, will your pension rights be lost? Ask the people who are trying to force you into the Union, what will happen to your pension rights? Don't accept empty promises. Let them show you on paper the effect of the loss of your present pension rights if the Union wins the election.

After noting that the Union cannot guarantee the "steady jobs" and "superior wages and working conditions" which the Company has "always been able to accomplish", the March 18 letter asked whether the Union had been able to stop unemployment (giving the current rates in New York and New Jersey) and told the employees to ask the Union "how many of its members are out of work now", to ask "the people who are trying to force you into a union to compare the stability of your jobs with the loss of

jobs in union plants", and to inquire "how many strikes there have been in the last two years and how many jobs have been permanently lost because of strikes." The March 18 letter closed with the declaration that:

> I am sure each of you know that your best interests must be determined by what is best for you and your family. If you lose your job or there is a strike, the Union officials continue to draw their salaries while you are out of work.
>
> And if you are out of work because of strike, you do not get unemployment insurance benefits. Ask the Union to tell you the truth about that.

The Company's March 25 (JD42; GCX 1(f), Appendix C) two-page letter instructed the employees to ask the Union "how many truckers have gor out of business in the last years because of the Union contracts" and how many drivers have, consequently, lost pension and seniority rights. It also asserted that the Union had not bargained a single contract which improved upon the employees' present conditions of employment; argued that no union can protect against layoffs; and stated:

> The Union says that Pinter Bros. will also reach an agreement if the Union wins. That is an empty promise. If the Union wins, the law requires that we bargain in good faith. It does not compel us to reach an agreement. If, in good faith we do not reach an agreement, there will be a strike and jobs will be lost.

The letter's closing remarks included:

> DON'T LET A FEW DISGRUNTLED EMPLOYEES SELL YOU DOWN THE RIVER.
>
> You have an obligation first to yourself and your family. When you enter the voting booth, decide

> whether you want to gamble on some future promises against what has been solid performance by Pinter Bros. since you have been working here.

2. The Pre-election Speech

On March 24, two days before the March 26 representation election, the Company scheduled two meetings, one for the day shift clericals and one for the night shift employees (JD13, 45; Tr. 432). At these meetings, Pinter, Sr., referring to notes, reiterated much of what had been said in the Company's letters. He told the employees that the Company offered good working conditions and pay; that many companies in the industry were going out of business; that a union could not guarantee jobs; that nobody likes anybody coming in and and telling them how to run a business; that the Company was always prepared to listen to grievances (JD13; Tr. 654, RX 5.) Pinter Sr., also referred to the "two girls" who had been fired, saying he had a telephone survey showing the calls made by them and that anyone was welcome to see it. He stated he had been talking to a friend of his about these employees "causing all this trouble" and he could not understand why they would be so unhappy. (JD13; Tr. 432, 681-682.) Pinter Sr. went on to say that if the Union won, he had to negotiate but did not have to reach agreement (Tr. 682). When an employee asked what would happen if an agreement was not reached, Pinter said "there could be layoffs and men out of work." (JD13; Tr.682, 640.)

During the day shift meeting, in answer to a question as to whether the night clericals could bump the day employees, Pinter Sr. said that it could

be so (JD13; Tr. 429, 682, 702-703). In answer to another question as to whether day clericals might have to go on the night shift, Pinter, Sr. replied in the affirmative. Pinter, Sr. then stated that if the Union was elected, the employees would be put into job classifications, and that if new jobs opened up, present employees could not qualify for them because they would be locked into their classifications. (JD 13-14; Tr. 683.)

E. The Union loses the election and files objections.

The Board scheduled a secret ballot election for March 26. On the day of the election, employees Barber, Pagliarulo, Gulbrandsen and Healy came to the Company's premises during voting hours in order to vote (JD37-38; Tr. 64-65, 219-220, 324-325). The gate leading to the main building was closed, and Company President Robert Pinter came out to the gate and told the women that they were on private property and that they should leave. Barber said that they had come to vote, but Robert Pinter told them he would not let them come in. (JD38; Tr. 65-66, 220.) Warren Mangan, an attorney for the Union, was present at the time and asked if Robert Pinter recognized the four women. Robert Pinter replied that he did. The four women left without voting. (JD38; Tr. 66, 221.)

That evening, Joseph and Robert Pinter dined with employees Claire Dorr, Dolores Fletcher, Doris Miller and several others (JD19, 31; Tr. 1811). Referring to the day's election, Joseph Pinter, Sr. said that he was "very hurt by [employee Doris Bonadonna's] actions . . .[t]hat she would turn on him like that" (JD31; Tr. 1810).

The Union lost the election by a vote of 14 to 18 with one ballot challenged (GCX 15).[7/] The Union subsequently filed five objections to conduct affecting the results of the election. The Regional Director overruled two of the objections. The three remaining objections, relating to the Company's refusal to admit prospective voters to the polling place, the letters sent to employees on February 19, March 18 and March 25, and the statements made to employees at the meetings held on March 24, were consolidated with the instant case, in which the same conduct was alleged to be violative of Section 8(a)(1) of the Act. (JD2; GCX 1(f).)

F. The Company forces employee Bonadonna to quit

The first set of hearings before the Board in the instant case took place on July 28-30, and on August 18-21. Doris Bonadonna, who worked in the accounting department on the second floor of the Company's building under the supervision of controller Charles Brown, was mentioned at the hearings as one of the employees who had participated in the Union's organizing activities.[8/] (JD26; Tr. 64.)

On Friday, August 15, before Controller Brown left for a week's vacation, he instructed Bonadonna and his other employees as to the duties they were to perform in his absence. He told Bonadonna that her main job was to help employee Doris Miller, a new employee replacing Vera Barber, in learning her job and that "she was to be free in case someone

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7/ The unit found appropriate by the Board consisted of all full time and regular part time office clerical employees employed by the Company at its Deer Park location, including the secretary to the General Manager (GCX 1(f)).

8/ Bonadonna had been working for the Company for almost ten years at the time in issue (JD26; Tr. 1590).

was out sick, or [was required] to appear in court." (JD26; Tr. 1746, 1753.) On the following Wednesday, August 20, supervisor Catherine Turk asked Bonadonna to help out downstairs if she had the time. About 45 minutes later, having completed her own work, Bonadonna went downstairs and helped Turk until about 4:45. Turk asked Bonadonna to help out the following day, but Bonadonna did not come to work because she was ill. (JD27; Tr. 1594-1595.) Both Pinters attended the unfair labor practice hearings on August 20 (Tr. 1204, 1373, 1705).

Bonadonna returned to work on Friday, August 22, and took up her normal duties. During the day, Bonadonna was called into the office of Joseph Pinter, Sr.; Robert Pinter was also present. The Pinters asked her several questions about why she had worked downstairs on August 20 instead of helping the other employees upstairs as she was supposed to. Bonadonna explained that the computer was not functioning and that supervisor Turk had requested her help. In reply to a question by Pinter, Sr. suggesting that her action constituted "harassment" of management, Bonadonna replied that she did not understand their attitude since she had worked hard on the 20th, adding that she was "a damn good worker." Upset and nervous, Bonadonna began to cry. (JD27; Tr. 1596-1599.) Pinter, Sr. told Bonadonna that her work was not in question and that her supervisor had always said she was a good worker (JD27; Tr. 1599-1600). Pinter Sr. then asked Bonadonna if he had ever spied on her or any of the girls. Bonadonna replied she did not know of any spying and indicated she did not know what he was talking about. When Pinter, Sr. inquired if he had ever harassed her, she replied that he had. Pinter,

Sr. asked her when, and as she was about to reply, Robert Pinter interrupted with: "All you girls do is lie. You are all liars." (JD27; Tr. 1600-1601.) Robert Pinter asked her if she wanted to see the "affidavits from the hearing" and insisted that he wanted her to read the "affidavits." Bonadonna continued to reply she knew nothing about them. Referring again to "lies" that were voiced at the hearing, Robert Pinter said he was sure Bonadonna's friends had told her about the hearing. She stated that she had been told and then said, "Do you want to know if I signed a card for the Union? I did". (JD27-28; Tr. 1601-1602.)

After this exchange, the Pinters talked about the employees being late, their spending too much time in the ladies room, their coming back late from lunch. Again they asked Bonadonna if she did not think this constituted "harassment" of management. The Pinters then inquired about an incident which occurred the previous day and Bonadonna reminded them that she had been out ill that day. Pinter, Sr. said he had not asked her why she was out, and there ensued some discussion about the employees' attitudes with Robert Pinter again telling Bonadonna that her friends were "liars" (JD28; Tr. 1601-1603). Pinter Sr. said that when Supervisor Brown returned from vacation, "this will all be straightened out" and Robert Pinter added that the Company "had let ten girls go and if Charlie [Brown] doesn't have enough work to keep you busy upstairs, I guess we don't need you, we can let a few more girls go" (JD28; Tr. 1604, 1716). Bonadonna thereupon stood up and said, "I quit. I'm sick. I'll give you two weeks notice." Pinter, Sr., smiling,

went to the door with Bonadonna and said that if she were sure, "that's fine with me." Bonadonna went to her desk and shortly thereafter returned to Pinter Sr.'s office with the request that she be permitted to go home as she did not feel well. The request was granted. (JD28; Tr. 1604.)

On the following Monday, Bonadonna told her supervisor, Charles Brown, that she had been upset and had not meant to quit, and that she had prepared a letter to the Company retracting her statement. Brown said he would talk to Pinter, Sr. and she should bring her letter to him later on. Subsequently, Bonadonna went to see Pinter, Sr. and, handing him the letter, told him she had not meant to quit. (JD28; Tr. 1607, GCX 20.) Pinter, Sr. read the letter, returned it to her and said "How would that look if I took you back? It would look--after you told everybody that you quit, it would look like I needed you." Bonadonna said she understood and left the office. (JD28; Tr. 1608.)

About August 30, Bonadonna mailed the letter to Pinter, Sr., and on September 3, Pinter, Sr. called her into his office, where, in the presence of Robert Pinter and a secretary, Pinter, Sr. told Bonadonna that the Company had reviewed the letter and could not accept her retraction. Bonadonna's employment was terminated on September 5, and a new employee was hired to take her place. (JD 29, 31; Tr. 1609.)

G. Employee Diane Lufker is criticized for testifying at the Board hearing and her conditions of employment are changed.

Employee Diane Lufker testified against the Company at the hearing which took place on August 18. On August 20, Lufker, who worked on the upstairs level, approached downstairs Supervisor Turk at about 3:00 p.m. and offered to help her out since computer problems had slowed down the regular flow of work to her. Turk accepted the offer. (JD33; Tr. 1653.)

On the following morning, August 21, while Lufker was making photocopies of a document, Pinter, Sr. who appeared to be "very upset," came to the Xerox machine and asked Lufker what she was copying, grabbed the document off the machine, told her she was doing the job incorrectly and showed her how to perform the work (JD33; Tr. 1653-1654). About 30 minutes later, Pinter, Sr. came to Lufker's desk and asked if the checks on her desk were all from the day's mail. When she told him that some had been collected by the drivers the previous night, he asked if she had any other checks in her desk. When Lufker said she did, Pinter, Sr. asked why they had not been deposited. Lufker explained that the checks did not have the necessary reference information because the computer had broken down. Pinter, Sr. then asked her for the document she had Xeroxed earlier and she gave it to him. (JD33; Tr. 1655, 1798-1799.)

That afternoon at about 3 or 3:30 p.m. Lufker again went downstairs and asked Turk if she could be of assistance in Turk's department since she had run out of work upstairs. Turk went to speak to Pinter, Sr. who came out of his office and asked Lufker whether she had asked the clericals

upstairs if they had any work for her, why she was not speaking to the employees, adding "if [you] did not like it here, [you] know where the door [is]." Before Pinter, Sr. returned to his office, Lufker asked him if she could help Turk if the upstairs employees had nothing for her to do; he said she could. (JD33; Tr. 1652, 1656-1657.)

Lufker returned to her office. She sought and received about 15 to 20 minutes work from one employee, and she made phone calls for another for 20 to 25 minutes. Having nothing further to do, she headed downstairs and again encountered Pinter. He asked if the employees had given her any work and she replied that they had. He then asked why she had not asked them for work before, whereupon Lufker replied that she really had not thought they needed her help. Pinter, Sr. then said, "Why didn't you open your mouth? You always seem to open it at the wrong time." (JD33; Tr. 1659.)

In August, Lufker began undergoing medical treatment. She did not work on August 11, the day of her first appointment, taking the entire day as unpaid sick leave. During the last week in August, after her initial testimony in the instant proceeding before the Board, Lufker had a second appointment. On the morning of that appointment, she told her supervisor, Charles Brown, that she would be leaving about 2:30 p.m. for her 3:00 o'clock appointment. Shortly before she left, Brown asked if she would be visiting the doctor for subsequent treatments; Lufker replied that it was possible. Brown advised Lufker that hence forth she would be required to take the entire day off. (JD35; Tr. 1661-1662.)

On the morning of September 9, Lufker called Brown at about 8:20 a.m. to tell him that she would not be able to report at the starting time of 8:30, but would be in before 9:00 a.m. Brown said "I don't think Mr. Pinter will let you work today," and told Lufker to call back in five minutes. Lufker said that she wanted to work and that she would come in and see what happened; Brown concurred. When Lufker arrived at 8:45, fifteen minutes after her regular starting time, her timecard was missing and Brown told her that she could not work that day because her lateness and absenteeism were "terrible." Asserting that Lufker could not work because "you can't give me an 8-hour day", Brown insisted that this applied to everyone in the office. Lufker told Brown she had a medical appointment the following day at 1:00 p.m., but he said she had to take that day off as well. Brown said that because Bonadonna was no longer working "it's been very hard on [him]"; when Lufker pointed out that this was all the more reason for her to work, Brown again said she had to "give [him] an 8-hour day." Lufker reported for work on the morning of September 10, but Brown would not let her work. (JD35; Tr. 1663-1665.)

Prior to September 9, Lufker had been permitted to come to work after advising Brown that she had to take time off during the day for a medical appointment. Also, prior to September 9, Lufker had at times reported late to the office but had been permitted to work, and to make up the lost time during her lunch hour or after her regular hours. (JD36; Tr. 1669, 1779.)

On September 30, Lufker informed Brown that she had scheduled another appointment for October 3 at 1 p.m., and asked if she could work that day. He asked if she was "filing charges," and she said she was. Brown stated that they had been through this matter before, and that she could not work. Brown also said that he had examined her records for 1973 and 1974, that they showed that she had been absent at least once a month, and that no company would allow so much absenteeism. Lufker pointed out that other people had left during work hours to see a doctor, and Brown said the only reason that practice had been permitted was because the others would only tell him about their appointment shortly before the were to go, and that he could not very well "chain them to the chairs." On several other occasions after October 3, Lufker was not allowed to work in the morning of the days on which she had medical appointments. (JD36; Tr. 1782, 1668-1669, 1786.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Vera Barber and Beatrice Pagliarulo; by laying off employees Jayne Healy and Deborah Gulbrandsen; and by constructively discharging employee Doris Bonadonna and thereafter refusing to re-employ her, all for engaging in protected Union organizational activities. The Board also found that the Company violated Section 8(a)(1) (3), and (4) of the Act by subjecting employee Diane Lufker to closer supervision than she previously had been given and by changing its lateness and sick leave policies as to provide Lufker with less employment than she had previously received

and normally would have received. The Board also found that the Company violated Section 8(a)(1) of the Act by threatening employees with reprisals, announcing anticipatory refusals to bargain and promising benefits in its pre-election letters and speeches; and by criticizing employee Lufker for having testified at a Board hearing.[9/] Finally the Board, Member Walther dissenting, found that the Company's unfair labor practices precluded a fair election and thus warranted a Section 8(a)(5) refusal to bargain finding and a remedial bargaining order. (D. 1-5, JD 49-50).[10/]

The Board's order directs the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the order directs the Company to offer reinstatement to employees Barber, Pagliarulo, Healy, Gulbrandsen and Bonadonna and to make them whole for any loss of earnings suffered by reason of the discrimination against them; to make employee Lufker and

9/ The Board found that the Company's refusal to admit the four prospective voters to the polling place interfered with the conduct of a fair election, but found it unnecessary to pass upon the Administrative Law Judge's further finding that such conduct violated Section 8(a)(1) of the Act (D.2). Member (now Chairman) Fanning indicated that he would adopt the Administrative Law Judge's Section 8(a)(1) finding on this point (D. 2, n. 4).

10/ The unit of clerical employees involved in the instant case is not in existence at the present time. Accordingly, in order to narrow the issues and save the Court's time, the parties, with the approval of Staff Counsel for the Court, have agreed to hold the issue of the Company's bargaining obligation in abeyance until such time, if ever, that clerical unit again comes into existence. Thus, issues as to the Company's refusal to bargain and remedial bargaining order are not before the Court at this time.

other employees whole for all losses they may have incurred as a result of the promulgation of the Company's discriminatory rule refusing to permit employees to work part-time on days on which they have medical appointments or are late for work; to rescind the discriminatory rules prohibiting employees from working on days on which they have medical appointments or are late for work; to bargain with the Union upon request; to preserve all personnel and related records; and to post the appropriate notices. (D. 5-6, JD51-52.)

## ARGUMENT

### I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN THE EXERCISE OF THEIR ORGANIZATIONAL RIGHTS IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

Sections 7 and 8(a)(1) of the Act broadly protect employees' rights to organize and bargain collectively free from employer interference. As shown in the Statement, the Company responded to the 1975 organizational effort of its clerical employees with a barrage of threats of reprisals, anticipatory refusals to bargain, and promises of benefits, as well as discriminatory discharges and layoffs of pro-Union employees. The record abundantly supports the Board's findings that these coercive actions violated Section 8(a)(1) of the Act.[11/]

11/ The unlawful discharges and layoffs are discussed infra pp. 30-45.

A. Threats

The law is settled that threats of reprisals for union activities violate Section 8(a)(1). N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 618-620 (1969); N.L.R.B. v. General Stencils, Inc., 438 F. 2d 894, 900 (C.A. 2, 1971); N.L.R.B. v. Taber Instruments, 421 F. 2d 642, 643 (C.A. 2, 1970). And it is well settled that "a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made . . . in the context of the employer-employee relationship." N.L.R.B. v. Gissel Packing Co., Inc., supra, 395 U.S. at 620. The Board, for its part in interpreting the impact on employees of employer statements, has a "duty to focus on the question: '[W]hat did the speaker intend and the listener understand' . . . in the context of [the employer's] labor relations setting," taking "into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." N.L.R.B. v. Gissel, supra, 395 U.S. at 617, 619. Indeed, "language may imply a threat as well as constitute a threat directly," and since "the economic dependence of employees on their employer may cause them to be peculiarly sensitive to nuances in language which would be lost on a neutral observer, the possibility that a statement contains an implied threat must be judged from the employee's point of view." Mon River Towing, Inc. v. N.L.R.B., 421 F. 2d 1, 9 (C.A. 3, 1969) (emphasis in original). "It is a question of whether, under the circumstances existing, the employees could

reasonably conclude that the employer is threatening economic reprisals if they support the Union." Hendrix Mfg. Co. v. N.L.R.B., 321 F. 2d 100, 105 (C.A. 5, 1963).

In a series of letters sent to the clerical employees in anticipation of the March 26 election, the Company repeatedly stressed the possibility of loss of jobs in the event of unionization. For example, in the February 19 letter, employees were told that no union could do as well as the Company in the way of job security; that if the Union won the election, "there is a strike, or the employer finds ways to replace workers and reduce the work staff." Employees were told that when labor costs rise, "the company begins to lose money and jobs are lost"; that the Union would not tell them about the dues, assessments, strikes "or loss of jobs;" and that the Union cannot force an employer to pay more than the employer can afford to pay "otherwise the employer is driven out of business and jobs go down the drain." (JD43-44; GCX 1(f), App. A.)

The March 18 letter picked up the same themes, repeating that the Union organizers had no interest "in your job"; emphasizing a comparison between the loss of employment in organized plants with "stability" of employment with the the Company; and ominously referring to what would happen "if you lose your job or there is a strike." (JD44; GCX 1(f), App. B.) The March 25 letter emphasized companies which had gone out of business "because of the union contracts," and warned that employees were being "sold down the river." In addition, the letter noted that if agreement is not reached, "there will be a strike and jobs will be lost." (JD44; GCX 1(f), App. C.) The letters also referred to "disgruntled" employees

who did "not care much whether your job is safe or not" (JD42)--a comment which served to underscore the Company's previous discrimination against four pro-Union employees.

In short, the Company's three pre-election letters, reinforced by the March speech (JD45), conveyed the clear message that selection of the Union would result directly in the loss of jobs. As the Board noted, the letters contained "a steady, persistent drumbeat hearalding a loss of jobs in the event of unionization" (JD43). The "repeated and wholesale" references to job loss were clearly not overridden by the fleeting mention of the duty to bargain in good faith. The Company's "lip service" paid to that duty was "effectively cancelled" by the suggestions that the Company would be inflexible in bargaining, that a strike was inevitable, and that jobs would be lost from strikes or other reasons ("If you lose your job or there is a strike" (GCX 1(f), App. B., p. 2, emphasis supplied). Thus, the letters could reasonably be interpreted by the employees as indicating that the Company "intended to retaliate against their job security in unnamed ways for selecting a union" (JD44). In these circumstances, the Board properly found that the Company statements which suggested that employees who voted for the Union were putting their jobs on the line was a violation of the Act. (JD45.) See N.L.R.B. v. L.E. Farrell Company, Inc., 360 F. 2d 205, 207 (C.A. 2, 1966).

Equally coercive were the Company's suggestions that in the event of unionization, a) costs would rise possibly driving the employer out of business, and b) job classifications would have to be established from which employees could not escape. In N.L.R.B. v. Gissel Packing

Co., supra 395 U.S. at 618, 620, the Supreme Court admonished that, to avoid being considered threats, employer "predictions" about the effect of unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequence beyond its control . . . ." In the instant case, the Company has not come forward with any objective evidence to show that its "predictions" of going out of business or being obliged to establish job classifications were anything other than oblique threats of retaliation in the event of unionization. Absent a showing that the stated consequences of unionization are "demonstrably probable," such statements contain a "distinct flavor of reprisal." N.L.R.B. v. General Stencils, supra, 438 F. 2d at 900. See also Gissel Packing Co., supra, 396 U.S. at 618-620; Zim's Foodliner, Inc. v. N.L.R.B., 495 F. 2d 1131, 1137 (C.A. 7, 1974), cert. denied 419 U.S. 838.

In addition to the foregoing threats of loss of jobs, closure and forced employee classification, the Company further threatened employees by implying that, if the Union came in, the Company would not reach agreement and that bargaining would be a futile exercise. Thus, in its March 25 letter, the Company stated that "[t]he Union says that Pinter Bros will reach an agreement if the Union wins. That is an empty promise." (JD44; GCX 1(f), App. C, p. 2).[12/] As the Board concluded, "No clearer manifestation of a fixed determination not to reach agreement could be

12/ The concept of an "empty promise" had been introduced earlier in the March 18 letter in connection with possible loss of pension rights (JD42; GCX 1(f), App. B, p. 2).

made" (JD44). As it is beyond dispute that remarks "conveying to . . . employees the futility of self organization" are violations of the Act, this statement further interfered with employee rights of self-organization. N.L.R.B. v. Patent Trader, Inc., 415 F. 2d 190, 198-199 (C.A. 2, 1969). Accord: N.L.R.B. v. Fitzgerald Mills Corp., 313 F. 2d 260, 268 (C.A. 2, 1963), cert. denied, 375 U.S. 834; N.L.R.B. v. Henriksen, Inc., 481 F. 2d 1156, 1162 (C.A. 5, 1973).

B. The Promise of Benefits

It is also settled that Section 8(a)(1) prohibits an employer from soliciting employee grievances with an implied promise to correct them in order to induce disaffection from the union. See N.L.R.B. v. Rollins Telecasting, Inc., 494 F. 2d 80, 83-84 (C.A. 2, 1974), cert. denied, 419 U.S. 964; N.L.R.B. v. Patent Trader, Inc., supra, 415 F. 2d at 199; Landis Tool Co., Division of Litton Industries v. N.L.R.B., 460 F. 2d 23, 24-25 (C.A. 3, 1972), cert. denied, 409 U.S. 915. As these cases indicate, a practice of seeking out employee grievances, in itself, is not unlawful. But where an employer responds to union organizing activity with a new found interest in eliciting employee grievances and conveys a promise (express or implied) of correcting those grievances, the Board properly finds a violation. Thus, as the Court noted in N.L.R.B. v. Delight Bakery, Inc., 353 F. 2d 344, 345 (C.A. 6, 1965), when an employer "in close proximity to a newly initiated union organization campaign, suddenly exude[s] a previously undemonstrated solicitude for communicating with its employees and meeting their problems . . . [it would be] hard

to say that an NLRB inference of unfair labor practice motivation lacks support in the record." See also, N.L.R.B. v. Yokell, 387 F. 2d 751, 755 (C.A. 2, 1967) (" . . . [employer] willingness to receive and consider employees requests at a time which coincided with the first union organization campaign . . . might well have indicated to the average employee that better conditions would be forthcoming . . . .").

Here, the Company announced in its February 19 letter that "[i]f there have been any grievances which have not been settled, we will do our best to see that the reasons for grievances will be eliminated." (JD45; GCX 1(f), App. A, p. 2). The clerical employees were not represented by a union, and the Company's statement that management was always "available" to the employees carried both the implied threat that this availability would cease in the event the Union came in, and the implied promise that a direct solution to employee grievances was available only in the absence of the Union. Such an invitation to employees has the effect of "undermining the position of the employees' chosen bargaining representative" and, as such, is a violation of the Act. N.L.R.B. v. Patent Trader, Inc., supra, 415 F. 2d at 199.

## II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEES BARBER AND PAGLIARULO, LAYING OFF EMPLOYEES GULBRANDSEN AND HEALY AND CONSTRUCTIVELY DISCHARGING EMPLOYEE BONADONNA

### A. Introduction and applicable principles

It is well settled that discharging, laying off or constructively discharging employees because of their union sympathies violates Section 8(a)(3) and (1) of the Act. N.L.R.B. v. V & H Industries, Inc., 433 F. 2d

9, 10 (C.A. 2, 1970); N.L.R.B. v. Diamond Standard Fuel Corp., 437 F. 2d 1163 (C.A. 1, 1971); N.L.R.B. v. Rubin, 424 F. 2d 748, 750-751 (C.A. 2, 1970). The Board here found that the Company violated Section 8(a)(3) and (1) by discharging Barber and Pagliarulo, the leading proponents of the Union, on January 17, within days of their distribution of Union cards and immediately following their attempt to enlist union support from the night shift employees; by abruptly laying off pro-union employees Healy and Gulbrandson on January 20, without regard for seniority or the Company's historical aversion to economic layoffs; and by forcing a valued employee, Doris Bonadonna, to "quit" on August 22 after testimony at the initial hearings in this case revealed her role in the union organizing activity. Before the Board, the Company urged that reasons other than union activity were responsible for these actions; that Barber and Pagliarulo were discharged for cause, that Healy and Gulbrandson were laid off for economic reasons, and that Bonadonna voluntarily quit. The issue is thus the familiar one of what was the employer's true motivation for the discharges and layoffs. American Ship Building Co. v. N.L.R.B., 380 U.S. 300, 312-313 (1965); N.L.R.B. v. George J. Roberts & Sons, Inc., 451 F. 2d 941, 945 (C.A. 2, 1971); N.L.R.B. v. Great Atlantic and Pacific Tea Co., 340 F. 2d 690, 693 (C.A. 2, 1965); N.L.R.B. v. Dorn's Transportation Co., 405 F. 2d 706, 713 (C.A. 2, 1969).

In reviewing the Board's findings of discriminatory motives, the courts have recognized that, since the issue is one of a subjective intent, direct evidence is usually not obtainable and discrimination

can normally be proved only by the use of circumstantial evidence. See N.L.R.B. v. Link Belt Co., 311 U.S. 584, 602, (1941); N.L.R.B. v. Revere Metal Art Co., 287 F. 2d 632, 633 (C.A. 2, 1961); N.L.R.B. v. Melrose Processing Co., 351 F. 2d 693, 696 (C.A. 8, 1965). Thus, "[e]vidence of [motive] may consist both of direct testimony by one whose motive is in question and of inferences of probability drawn from the totality of other facts." N.L.R.B. v. Park Edge Sheridan Meats, Inc., 341 F. 2d 725, 728 (C.A. 2, 1965). It is also well settled that ascertainment of an employer's motivation is within the province of the Board, whose determination "cannot lightly be overturned." United Aircraft Corp. v. N.L.R.B., 440 F. 2d 85, 91-92 (C.A. 2, 1971); N.L.R.B. v. Advance Business Forms Corp., 474 F. 2d 457, 464 (C.A. 2, 1973).

B. Factors Indicating Anti-union Motivation Which Are Common to All the Discharges and Layoffs.

From the case law developed under Section 8(a)(3), there emerges a set of recognized factors which provide strong support for a finding of anti-union motivation. A number of these factors are present in the discharge of Barber and Pagliarulo, the layoff of Healy and Gulbrandsen, and the constructive discharge of Bonadonna. We will first outline these factors common to all discriminatory actions and then discuss the specifics as to each.

First, the Board was entitled to appraise the conflicting evidence regarding the Company's motivation in light of its hostility toward the Union, and its other violations of the Act. N.L.R.B. v. Milco, Inc.,

388 F. 3d 133, 138 (C.A. 2, 1968); N.L.R.B. v. Superior Sales, 366 F. 2d 229, 233 (C.A. 8, 1966); N.L.R.B. v. Georgia Rug Mill, 308 F. 2d 89, 91 (C.A. 5, 1962), cert. denied, 385 U.S. 8 20. As shown above, the Company's letters and speech are replete with threatened job loss in retaliation for union activity. Such threats and Office Manager Jacoby's subsequent reference to "two girls" being fired because the "old man . . . doesn't want the union in" (JD14, 20; Tr. 627) clearly indicate a disposition to take discriminatory action to defeat the Union drive.

Second, although the Company contended before the Board that it had no knowledge of the Union activities of the employees involved, the record clearly indicates the contrary. Thus, the record shows that Barber and Pagliarulo were highly visable leaders in the Union's campaign: Barber began speaking to other employees as early as October or November 1974 about the possibility of organizing, and Pagliarulo initiated the actual contact with Union shop steward Spera (JD14, 19; Tr. 29-30, 189-190). Both employees spoke to other employees, solicited signatures on Union authorization cards and freely discussed grievances and organization. Healy and Gulbrandsen, although not exceptionally active in the Union campaign (JD24), had signed cards and taken part in the Union discussions which took place both during free time and at work. Since the unit employees worked in unpartitioned offices in close proximity to their supervisors, 13/ it would seem highly improbable that the Company was

13/ Barber's desk, for example, was two desks removed from her supervisor's (JD19; Tr. 102), and Healy sat only 6 feet from Robert Pinter's desk (JD12; Tr. 350).

unaware of what was going on. See N.L.R.B. v. Dorn's Transportation Service, supra, 405 F. 2d at 713.

In addition, it is clear that Robert Pinter was familiar with the habits of his employees, and, indeed, testified that it was Company policy to maintain close contact with the employees (JD19; Tr. 1074-1075).[14/] The record also disclosed that Pinter, Sr.'s secretary had a custom of reporting employee activities to Pinter Sr., who testified that "it should be that way . . . ." (JD19; Tr. 1732-1733). That the Company in fact was seeking to identify specific pro-Union employees is indicated by supervisor Catherine Turk's question to employee Charlotte Destefanis in early January as to whether Destefanis "had heard any girls talking about a union" (JD14; Tr. 759-760).[15/] Moreover, the record indicates that the Pinters were aware that Barber and Pagliarulo were behind the organizational movement. Thus, in its first anti-Union letter of February 19, the Company refers to two employees discharged for abusing "telephone privileges" and discusses the personal use of telephones at considerable length ( CX 1(f),

14/ Thus, for example, Robert Pinter testified that Pagliarulo "very seldom ate" in the company lunchroom, and that "four or five girls usually go around the corner [to a restaurant] some place" (JD19; Tr. 1078). This obviously suggests that the departure of large groups of the employees for luncheon meetings, such as took place very frequently at the beginning of January, would attract attention. Indeed, on January 16, Jacoby and Robert Pinter stood at the window and watched a large group of the employees leave for lunch. Similarly, on January 10, General Manager Jacoby was in the lobby when the employees returned from lunch and continued to discuss the possibility of unionization if their grievances were not met, and he commented that "the door is not locked" (JD4; Tr. 38, 287).

15/ Destefanis' testimony was credited; Turk did not testify at the hearing (JD 14).

App. A). In its second letter, the Company refers to the two discharged employees as "stir[ring] up trouble" (GCX 1(f), App. B), a theme which was repeated in the March 24 speeches for which the Company's notes indicate that the development of the Union's propaganda was to be coupled with "the two employees [and] their excessive telephone calls" (JD13; RX 5).

In sum, the evidence supplied substantial support for the Board's conclusion that the Company did have knowledge of the employees' Union sympathies. See N.L.R.B. v. Long Island Airport Limousine, 468 F. 2d 292, 295 (C.A. 2, 1972); N.L.R.B. v. Pembeck Oil Co., 404 F. 2d 105, 110, (C.A. 2, 1968), vacated and remanded on other grounds, 395 U.S. 828, order enforced, 433 F. 2d 308 (C.A. 2, 1970); N.L.R.B. v. Stark, 525 F. 2d 422, 431, n. 8 (C.A. 2, 1975), cert. denied, 424 U.S. 967.

Third, the "abruptness of a discharge and its timing are persuasive evidence as to [the Company's unlawful] motivation." N.L.R.B. v. Montgomery Ward & Co., 242 F. 2d 497, 502 (C.A. 2, 1957), cert. denied, 355 U.S. 829. Accord: N.L.R.B. v. Dorn's Transporation Co., supra, 405 F. 2d at 713; N.L.R.B. v. Long Island Airport Limousine, supra, 468 F. 2d at 295; Trey Packing, Inc. v. N.L.R.B., 405 F. 2d 334, 339 (C.A. 2, 1968), cert. denied 394 U.S. 919. In the instant case, the discharges of Barber and Pagliarulo occurred just two days after these two first solicited employees to sign Union cards at the January 15 luncheon meeting,[16/] and

16/ Employee Ossenfort placed this meeting on January 16 rather than on January 15 as testified by Barber, Pagliarulo and four other employees. After careful evaluation of all the factors, the Administrative Law Judge credited the testimony indicating that the initial card solicitation took place on January 15 (JD 5-8). It is, of course,

(Continued)

on the very evening that they were observed attempting to gain support for the Union from the night shift (JD 9-10). In addition, their discharges occurred abruptly and were announced through the highly irregular form of a telegram. The layoff of Healy and Gulbrandsen on January 20 also coincided with the initial steps in the organizing effort and was highly unusual in that it was inconsistent with seniority and the Company's own pronouncements on avoiding economic layoffs (JD19, 24-25). Finally, the August 22 constructive discharge of Bonadonna came within a day of the Pinters' attendance at the unfair labor practice hearing where Bonadonna's role in the Union campaign was discussed, and where the Pinters once again were made aware of the organizational activities which had given rise to the Company's pre-election animus.

Finally, as is discussed below, the Company's defenses do not withstand scrutiny. On the contrary, they further strengthen the Board's inference of discrimination. N.L.R.B. v. United Mineral & Chemical Corp., 391 F. 2d 829, 833 (C.A. 2, 1968).

C. The Discriminatory Discharges of Barber and Pagliarulo

At the time of their discharges, Barber had been employed by the Company for seven years, and Pagliarulo for almost six. The Company

16/ settled law that credibility resolutions are within the special province of the Administrative Law Judge and the Board, and that such resolutions should not be overturned by a reviewing court absent extraordinary circumstances not present here. N.L.R.B. v. Warrensburg Board and Paper Corp., 340 F. 2d 920, 922 (C.A. 2, 1965); N.L.R.B. v. A & S Electronic Die Corp., 423 F. 2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

contends that these two long-time employees were discharged for making too many personal telephone calls. It is plain from the evidence, however, that this was merely a pretext and not the true motivation of the Company in effecting the two discharges. Thus, the record shows that when confronted with the telephone survey on January, both Barber and Pagliarulo promptly offered to pay for their calls--an offer which was not accepted. (Tr. 1056.) Robert Pinter advised them at that time that he would wait until receiving the next survey before deciding what to do with the two employees. Yet, the Pinters did not wait for the next survey. On the contrary, they discharged the two employees two days later, after business hours, by telegram, within an hour after Barber and Pagliarulo were seen talking to a night shift employee in the Company's parking lot and after that employee had been asked "if anyone had approached [her]" (JD21; Tr. 527). Barber and Pagliarulo had not been warned previously or disciplined about making personal telephone calls. In fact, the Company did not have a specific rule limiting telephone calls, nor had it ever previously disciplined an employee for making personal telephone calls (Tr. 48, 1273). Moreover, no one had ever been discharged by telegram in the forty-five year history of the Company (JD22; Tr. 527). All previous terminations had been made orally.[17/] Finally, the

17/ The explanations offered by the Company as to why the telegram were sent were unconvincing. Robert Pinter explained that normally Jacoby would handle terminations orally, but the latter was being phased out of his duties and Barber and Pagliarulo had left work by the time the decision to discharge them was made. (JD22; Tr. 958, 1039.) If, as stated by Joseph Pinter, the decision to discharge was not made until the end of the week, on Friday evening, at a time when

(Continued)

name of a third employee, who was not pro-Union, also appeared on the telephone survey. That employee was not discharged, nor even approached by the Pinters at the time the survey was received (JD9; Tr. 1034, 1274).[18]

Additionally, the reasons given to Barber and Pagliarulo for their discharges were conflicting and inconsistent. Both employees credibly testified that they separately encountered Pinter Sr. on the morning after their discharge; Pagliarulo was told that she had been discharged because "business is slow," while Barber was merely informed that she was no longer needed (JD11, 23; Tr. 61-62, 217). The telegrams, however, indicated that the discharges were for "violation of company policies." When Pagliarulo pointed out this inconsistency to Pinter Sr., he referred

17/ the two employees had already left, then the fact that Jacoby was no longer performing such functions had nothing to do with the failure to give oral notification. If, as Robert Pinter alternatively testified (Tr. 1039), the decision was reached on Wednesday or Thursday, "definitely" in consultation with Jacoby, there is no reason why Jacoby did not routinely handle the terminations on Friday night, since the record is clear that Jacoby continued to play an active role as office manager until the following June (JD22; Tr. 712). In addition, this expensive method of termination involving a telegram becomes doubly suspect when contrasted with Joseph Pinter's later reprimand to employee Diane Lufker for making two Xerox copies of a document as a "silly waste of time and money" (JD34; Tr. 1704). See N.L.R.B. v. Ra-Rich Manufacturing Corp., 276 F. 2d 451, 454 (C.A. 2, 1960).

18/ According to the credited testimony of Linda Schultz, Robert Pinter approached employee Dolores Fletcher on January 24 and jokingly told her that she had "nothing to worry about" with regard to her phone calls (JD21, n. 41; Tr. 408). Fletcher was one of the four unit employees who participated in a victory party held by the Pinters on the night of the election (JD21, n. 41; Tr. 1810).

her to his son. Such inconsistencies and vagueness as to the reason for the discharges may be interpreted as covering the real motive therefor—the Union activity of the employees involved. N.L.R.B. v. Georgia Rug Mills, supra, 308 F. 2d at 91.

Moreover, the pretextual nature of the Company's reasons is confirmed by the credited testimony of employee Diane Lufker, who overheard Office Manager Jacoby tell Controller Charles Brown in the Company's lunchroom sometime after the discharges that "[Jacoby] told the old man not to fire those two girls, but he said no, because he doesn't want the union in" (JD14, 29; Tr. 627).[19/]

In sum, where as here, the record showed that two employees were fired because the Company did not "want the Union in" (Tr. 627); the discharges occurred abruptly and in a highly unusual manner; the employees involved were long-time employees with good work records who had not previously been warned for making telephone calls; and where the discharge of the two most active Union adherents occurred in conjunction with their pro-Union activities, the Board correctly concluded that the Company's motivation was unlawful.

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19/ The Administrative Law Judge credited Lufker's testimony about the conversation she overheard between Office Manager Jacoby and supervisor Charles Brown. He found Lufker "uttered the words with a sense of conviction, and strongly conveyed the impression that she was repeating exactly what she had heard." (JD 20). Brown did not testify, and the Judge found Jacoby's denial of the statement "carried no similar ring of conviction" (JD 20). As explained in n. 16, supra, such credibility determinations fall within the province of the Board.

D. The Layoffs of employees Healy and Gulbrandsen

Before the Board, the Company contended that the January 20 layoffs of Healy and Gulbrandsen were economically motivated, despite the coincidence with the beginning of union activity and the demand for recognition. At the January 10 meeting, however, Pinter Sr. promised the employees that "if things got bad," which he said he doubted, he would consider going to a four-day week rather than letting even the "least senior employees go" (JD4; Tr. 36, 311). Ten days later, not only had the four-day concept been discarded, but two active pro-Union employees were laid off,[20/] out of seniority order,[21/] minutes after the employees had attended a Union meeting and after the Union had requested recognition. Such "stunningly obvious timing" gives rise to an inference of unlawful motivation in the case of these layoffs, as well as the discharges of Barber and Pagliarulo. N.L.R.B. v. Rubin, supra, 424 F. 2d at 750. Accord: N.L.R.B. v. Pembeck Oil Corp., supra, 404 F. 2d at 110.

20/ Healy and Gulbransen were with Barber and Pagliarulo in the parking lot on January 17 waiting for the night shift employees and also attended the Monday morning, January 20, pre-work Union meeting.

21/ Healy, who had been employed for two years, was senior to five employees besides Gulbrandsen. Gulbrandsen, who had only been hired six months earlier, nevertheless was senior to at least one other employee. (Tr. 359-360, 323). In addition, as she credibly testified, at the time of her early morning lay-off, she had enough work to keep her busy all day (Tr. 324).

This was the first time that the Company had laid off employees for economic reasons since its formation in 1930 (JD25; Tr. 1280, 1312).[22/] Moreover, it was a time when business was traditionally slow and an economic motive for the layoffs seems highly improbable since the Company stipulated that the employee complement remained constant from January 20 to March 26 (JD19; Tr. 1245). In addition, Robert Pinter admitted that "at least one" of the two employees could have performed the work of less senior employees who were retained (JD25; Tr. 323). Where, as here, employees are assured they will not be laid off and subsequently are laid off in conjunction with union activity and out of seniority, "the Board could properly infer that the layoffs occurred because of the employees' suspected or real Union sympathies." N.L.R.B. v. Firedoor Corp. of America, 291 F. 2d 328, 332-333 (C.A. 2, 1961), cert. denied, 368 U.S. 921; N.L.R.B. v. Ra-Rich Mfg. Corp., supra, 276 F. 2d at 454.

E. The Constructive Discharge of Doris Bonadonna

A constructive discharge arises where an employer "deliberately made [the employee's] working conditions intolerable and drives her into an involuntary quit"-- (N.L.R.B. v. Tennessee Packers, Inc., 339 F. 2d 203, 204 (C.A. 6, 1964))-- conduct long recognized as unlawful where it is motivated by union considerations. N.L.R.B. v. Ra-Rich Mfg. Co., supra, 276 F. 2d at 454. In the instant case, the record amply warrants the Board's

22/ A 1974 reduction was accomplished by attrition rather than layoff. No other employees were laid off prior to the March election, although five or six were laid off subsequent thereto. All of these latter were laid off according to seniority. (JD 25).

conclusion that Doris Bonadonna was constructively discharged and that her "quit" was far from voluntary as the Company contends.

The record shows that Bonadonna had been employed by the Company for almost ten years. During the time in issue, worked in the accounting department under the supervision of Controller Charles Brown, who had always considered her a very good worker and had so advised Pinter, Sr. (JD 26, 29; Tr. 1751). Bonadonna was a pro-Union employee; she signed an authorization card; and one of the first Union organizational meetings—at which Union authorization cards were distributed and signed—was held at her house (Tr. 64). On the day of the election, Pinter, Sr. had said he was "very hurt" that Bonadonna had "turned" against him—and her name was mentioned in the course of the unfair labor practice hearings, which the Pinters attended on August 20.

As described in the Statement, supra, the incident which the Company seized upon to initiate Bonadonna's forced quitting, was her leaving her usual job to come to the Company's downstairs level to help Supervisor Catherine Turk at the latter's request, on August 20, the day the Pinters attended the hearing.[23/] Bonadonna was absent on the following day, and shortly after returning to work on August 22, she was called into the Company's office and questioned by both Pinters about having left her job to go downstairs to work for supervisor Turk. In the course of the approximately forty-five minute session, Bonadonna was asked by Pinter

23/ Bonadonna credibly testified that she could not continue on her usual job because the computer had been out of order all week (Tr. 1593).

Sr. whether he had ever spied on her or harassed her; she was told her fellow employees were "liars" and had sighed "affidavits;" and she was asked whether the conduct of the employees did not constitute harassment of management (JD 27-28; Tr. 1599-1602). Although Bonadonna began to cry and insisted she knew nothing about what was being asked of her, the Pinters continued to press her in a discussion about employee testimony and affidavits at the hearing until she finally blurted out that she had signed a Union card (JD 28; Tr. 1602). Still the Pinters would not let her go back to work, and finally Robert Pinter said that the Company had "let ten girls go" and if there was not enough work to keep Bonadonna busy upstairs, "I guess we don't need you [and] we can let a few more girls go." (JD 28; Tr. 1604). It was this last remark which finally caused a tearful Bonadonna to resign, a resignation accepted with smiling alacrity by Pinter, Sr.

The Pinters were aware that Bonadonna was "a noticeably nervous and emotional person" (JD 29). Bonadonna sat at a desk directly in front of Robert Pinter, where he could observe her, and she credibly testified that Robert Pinter, Catherine Turk and Charles Brown all were aware of her nervousness (Tr. 1651). Moreover, approximately four years earlier, she had become very upset when called into Robert Pinter's office because of a disagreement with Charles Brown (JD 29; Tr. 1642). Thus, the beleaguering conversation in which the Pinters engaged Bonadonna for almost an hour—allegedly because she had done some work away from her usual post at the request of a supervisor—clearly was calculated

to unnerve her. The circumstances of the conversation, the triviality of the offense, the Pinters' express assurance to Bonadonna that the quality of her work was not in issue, the hiring of an inexperienced person to replace her and the coincidence in timing with the Board hearing, all tend to reinforce the Board's conclusion that the Pinters were angry with the pro-Union employees as a result of what they heard at the Board hearing, and took the first opportunity which presented itself to harass Bonadonna into quitting. Indeed, Pinter Sr. had made his feelings about Bonadonna quite clear when he mentioned to a group of anti-Union employees after the election that he was "very hurt" that Bonadonna had "turned against" him (JD 31; Tr. 1810).

Furthermore, the Company's true motivation is underlined by its refusal to take Bonadonna back when she attempted to rescind her resignation on the next working day. Pinter, Sr. refused to accept her letter requesting to come back to work, contending first that to take her back "would make people think that [the Company] needed [her]" and that this would constitute a form of blackmail since several employees were aware of her resignation. (JD 32; Tr. 1608). The Board properly found this reason to be "nonsensical" (JD 32). The record shows that in fact the Company did need Bonadonna: a replacement was hired for her, and despite this replacement, Supervisor Charles Brown commented to employee Diane Lufker that Bonadonna's absence was "very hard on [him]" (JD 35; Tr. 1664).

The Company advanced a second reason why it had refused to take back Bonadonna--namely that it would set a bad precedent to have "everybody just quitting and coming back" (JD 32; Tr. 1702). This second reason, however, was also found to be "unconvincing" since, Bonadonna, as the Pinters readily admitted, had always been a good worker and satisfactory employee; she had been with the Company for almost ten years; and she was replaced by an employee without experience. In sum, the reasons advanced by the Company are plainly sham excuses for eliminating this outstanding but pro-Union employee for "turning against" the Company on the matter of the Union. Such conduct clearly constitutes a discriminatory constructive discharge and refusal to reinstate in violation of Section 8(a)(3) and (1) of the Act.

## III. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1), (3) AND (4) OF THE ACT BY DISCRIMINATING AGAINST EMPLOYEE DIANE LUFKER BECAUSE SHE TESTIFIED AT A BOARD HEARING

Section 8(a)(4) of the Act makes it an unfair labor practice for an employer to take reprisals against an employee for giving testimony under the Act. N.L.R.B. v. Scrivener, 405 U.S. 117, 121-125 (1972); N.L.R.B. v. Jack LaLanne Management Corp., 539 F. 2d 292, 294 (C.A. 2, 1976); N.L.R.B. v. J.P. Stevens and Co., 464 F. 2d 1326, 1348 (C.A. 2, 1972),

cert. denied, 410 U.S. 926; and Section 8(a)(3) of the Act prohibits an employer from discriminatorily discouraging employee union membership or activity. Thus, if an employer changes the terms and conditions of employment,[24/] or disciplines an employee,[25/] the employer's conduct will violate Section 8(a)(4) if he is acting in retaliation for the employee's testifying at a Board hearing, and will violate Section 8(a)(3) if also motivated by anti-union animus.

The purpose of Congress in enacting Section 8(a)(4) was to ensure that all persons having information about possible unfair labor practices would be "completely free from coercion against reporting them to the Board." N.L.R.B. v. Scrivener, supra, 405 U.S. at 12[illegible] quoting Nash v. Florida Industrial Commission, 389 U.S. 235, 238 (1967). "This complete freedom is necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses'" (Id. at 123, quoting John Hancock Mutual Life Insurance Co. v. N.L.R.B., 191 F. 2d 483, 485 (C.A.D.C., 1951,). The Board should "utilize every resource at its

24/ Change in conditions of employment for giving testimony under the Act: N.L.R.B. v. J.P. Stevens and Co., supra. Change in conditions of employment for union activity: N.L.R.B. v. Lowell Sun Publishing Co., 320 F. 2d 835, 840 (C.A. 1, 1963); N.L.R.B. v. A & S Electronic Die Corp., 423 F. 2d 218, 222 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

25/ Disciplining an employee for giving testimony under the Act: N.L.R.B. v. Lifetime Door Co., 390 F. 2d 272, 276 (C.A. 4, 1968). Disciplining an employee f[illegible]nion activity: Robertshaw Controls Co. v. N.L.R.B., 483 F. 2d 762, 765-766 (C.A. 4, 1973).

command" to protect witnesses from employer intimidation. Pederson v. N.L.R.B., 234 F. 2d 417, 420 (C.A. 2, 1956).

In the instant case, the Company reacted to Lufker's August 18 testimony at the Board's unfair labor practice hearing by taking almost immediate reprisal against her for her damaging testimony to the Company. Thus, as described in the Statement, supra, pp. 19-20, on August 21, Joseph Pinter, Sr. criticized the manner in which she was Xeroxing a document, questioned her about checks received and why they had not been deposited, and later suggested that if she "did not like it here, [she], knew where the door was." (JD 33; Tr. 1656-1657). Later in the day, Pinter, Sr. ran into Lufker coming downstairs to look for work and asked her why she had not asked the upstairs employees if they had work for her. When Lufker replied that she did not think they needed her help, Pinter, Sr. said "Why didn't you open your mouth? You always seem to open it at the wrong time." (JD 33; Tr. 1659).[26/]

Pinter, Sr. contended that he spoke to Lufker because she was making a Xerox of a document incorrectly. He denied having told Lufker she had a "big mouth." The Administrative Law Judge, however, credited Lufker's version of the events, including her uncontradicted testimony that Pinter, Sr. had never evinced any direct interest in her work prior to August

26/ Joseph Pinter, Sr.'s statement to Lufker was also found to be an independent violation of Section 8(a)(1) of the Act (JD 46). The Board found that the second sentence "plainly implied displeasure with Lufker's testimony of August 18, and [] . . . would reasonably tend to discourage an employee from engaging in like conduct in the future" (ibid).

21; that she had often worked downstairs for Supervisor Turk and that although her accounts receivable were not posted on August 20, she had been unable to complete that work because the computer was broken. In light of Pinter, Sr.'s lack of criticism prior to Lufker's testimony, the fact that he criticized her twice for a trivial matter and that he accused her of opening her mouth "at the wrong time", clearly indicate that he intensified surveillance of her work and criticized her because he was angry about the testimony given by Lufker on August 18 at the Board hearing, and his conduct, therefore, violated Section 8(a)(4), (3) and (1) of the Act.

The change in rules relating to Lufker's sick leave also was occasioned by her testimony at the Board hearing. Thus, as Lufker credibly testified, prior to her appearance at the hearing, she had always been permitted to continue working after having advised her supervisor that she would leave later in the day for a medical appointment. Similarly, if she reported late to the office on occasion, she had always been permitted to work and also to make up the lost time by working during the lunch hour or after her regular hours. (JD 36; Tr. 1663-1665). Shortly after her appearance at the hearing, however, at the beginning of September, 1975, Supervisor Charles Brown advised her that she could no longer work half days. In addition, she was no longer allowed to come in late, regardless of the reason for being late.[27/] Thus, on one

27/ Brown admitted that, prior to September, other employees had been permitted to work despite their arrival at work as much as one hour late (JD 36; Tr. 1783).

occasion when Lufker arrived only fifteen minutes late after having advised Brown that she had a doctor's appointment, he refused to let her work. The only reason advanced by the Company, through Brown, regarding the new policies, was that Lufker could not give the Company a full eight hour day. It therefore chose not to let her work at all. The Board found that this reason "does not make much sense" since the Company did not compensate employees for sick leave or lateness, and would have lost nothing by allowing Lufker to work. In addition Brown's explanation to Lufker that Bonadonna's absence was "hard" on him would indicate that a 7 3/4 hour day would be preferable to a non-working day. Since the rule admittedly was promulgated only after Lufker's testimony before the Board and since no plausible reason was advanced therefor, the Board was warranted in finding that the Company's new rule and its refusal to let Lufker work part time on September 10, October 3 and on other days when she had medical appointments, and on September 9 when she arrived a few minutes late for work, was in retaliation for her adverse testimony at the Board hearing.[28/]

28/ In an attempt to show that Lufker was absent frequently, the Company introduced records showing that in 1975, prior to August 18, she was absent on 12 days: five full time and 7 part time. The only other record in evidence pertains to Patricia Ossenfort, an employee who testified for the Company at the hearing. Ossenfort, during the same period, had been absent 10 times, including 7 full days. Lufker's record shows her first appearance at the hearing as an absence. Ossenfort's record is only current as of August 20, the day she testified for the Company. Thus, Ossenfort, as of September 9, would have been absent at least 8 full days. No sanctions were imposed on Ossenfort for being late or absent. (JD37; GCX 21, RX9.)

## CONCLUSION

For the forgoing reasons, we respectfully request the Court to enter a judgment enforcing in full the Board's order regarding the violations of Section 8(a)(1), (3) and (4) of the Act.

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March 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

| | | |
|---|---|---|
| NATIONAL LABOR RELATIONS BOARD, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. 77-4153 |
| | ) | |
| PINTER BROS., INC. | ) | |
| | ) | |
| Respondent. | ) | |

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief and one (1) copy of the Board's Designation of Record in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D.C.

this 10th day of March, 1978.